



February 8, 2023

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667

BY FOIA ONLINE AND BY EMAIL: hq.foia@epa.gov

Re: FOIA Request Re: Hazardous Waste Burning Facilities' Notifications of Compliance and Associated Performance Testing

Dear National Freedom of Information Officer:

On behalf of the Sierra Club and pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*; 40 C.F.R. § 2,100, *et seq.*, we request that the United States Environmental Protection Agency ("EPA") provide **copies of "Notifications of Compliance," including the associated performance testing results, submitted by hazardous waste burning facilities, see 40 C.F.R. § 63.107, since January 1, 2010.** EPA regulations require hazardous burning facilities to conduct alternative comprehensive and confirmatory performance testing at 2.5 year intervals. *See* 40 C.F.R. § 63.1207 (requiring comprehensive performance testing "61 months after the date of commencing the previous comprehensive performance test," and confirmatory performance testing "31 months after the date of commencing the previous comprehensive performance test"). EPA regulations additionally require hazardous waste burning facilities to submit to EPA the results of such performance testing in "Notifications of Compliance" within 90 days. *Id.* Sierra Club requests a public interest fee waiver for this FOIA request.

Please do not include any records that have already been placed in a regulations.gov docket; instead, for any such documents, please provide a list with each specific full web link with the full document ID number. To the extent that records responsive to this request are available in a widely-used electronic format (*e.g.*, pdf, Excel, Word, or WordPerfect files), we would prefer to receive them in that format, provided that the electronic versions are in comprehensible form.

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating the public and advancing the purposes of the Clean Air Act. In the event that any requested document is claimed, or continues to be claimed, exempt from disclosure or review, or otherwise withheld, we request an index or log of documents withheld, with the maximum possible identifying information that you can provide, including a description of the document withheld, its date, its location, its recipient(s) and the specific reason(s) the document is being withheld. 5 U.S.C. § 552(b). If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record. If the requested documents do not exist, please indicate that in your written response.

We also request that responsive records be released as soon as they are available, on a rolling basis, but in no event later than 20 days, as required by law. To the extent that some subset of the requested records is readily available and can be provided immediately, please send them immediately while EPA searches for other records.

Fee Waiver Request

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), Sierra Club requests a fee waiver because “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) the existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)–(3), weigh in favor of granting Sierra Club’s fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a “Direct and Clear” Connection to Operations or Activities of the Federal Government.

Sierra Club’s request focuses on and thus plainly concerns information regarding the operations and activities of the federal government. It seeks information regarding sources of hazardous air pollution that the EPA has a legal responsibility to regulate to protect public health and the environment under the Clean Air Act and other statutes. The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government.¹ The requested records are directly and clearly related to EPA’s regulation of hazardous waste burning facilities.

¹ DOJ Fees and Fee Waivers at 27,
<https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/fees-feewaivers.pdf#p22>.

Factor 2: Disclosure of the Requested Records is “Likely to Contribute” to Public Understanding of Government Operations or Activities.

The Freedom of Information Act Guide makes it clear that, in the Department of Justice’s view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of EPA’s decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request.

The information that the Sierra Club seeks will significantly contribute to the public’s understanding of EPA’s regulation of emissions of hazardous air pollutants from hazardous waste burning facilities. This information will facilitate meaningful public participation, review, and contributions to EPA’s rulemaking processes and any other potential public comment opportunities regarding EPA’s legal obligations to regulate hazardous waste burning facilities, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of the agency’s decision-making process.

Factor 3: Disclosure of the Requested Records Will Contribute to “Public Understanding” of EPA’s Regulation of Hazardous Waste Burning Facilities.

The Sierra Club has demonstrated involvement in clean air issues, particularly on hazardous air pollutants for decades. For years, Sierra Club has reviewed and disseminated information to other concerned members of the public and has submitted comments into most of the dockets for national emission standards governing major sources of hazardous air pollutants. The Sierra Club also unquestionably has the “specialized knowledge” and “ability and intention” to broadly disseminate the information requested in a manner that contributes to the understanding of the “public-at-large.” Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club’s website, emailing and listserv distribution to its members and supporters across the U.S., and via public meetings and events. Every month the Sierra Club website receives roughly 850,929 individual visits and 1,586,134 page views. *Sierra Magazine*, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 855,000 people across print and online subscribers. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

Sierra Club’s detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. *See, e.g., Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

Factor 4: Disclosure of the Requested Records Will Make a “Significant” Contribution to the Public’s Understanding of EPA’s Regulation of Hazardous Waste Burning Facilities.

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor. The public has little to no information on the emissions of hazardous waste burning facilities, and this will be increased after disclosure of the requested performance testing results.

There is no Commercial Interest in Disclosure of the Requested Records.

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a nonprofit, tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

* * *

Therefore, we respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). In the event that your agency denies a fee waiver, please send a written explanation for the denial. If you deny our request for a fee waiver, please provide an estimate of all charges for supplying the records Sierra Club has requested in advance and allow me to respond to the estimate before proceeding with fulfilling the request.

Record Delivery

We prefer to receive the records in **searchable and analyzable electronic format wherever possible**. We request that EPA comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations. 5 U.S.C. § 552, *id.* § 552(a)(6)(A)(i); 40 C.F.R. § 2.104. This includes the requirement that a response to this request must be made within 20 working days of your receipt of this letter.

Please mail or email copies of all requested records as soon as possible to us at the email addresses in the signature block below. **Please produce them on a rolling basis**; at no point should the search for—or deliberation concerning—certain records delay the production of

Administrator Regan, FOIA Officer, and OAR

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others that the agency has already retrieved and elected to produce. If EPA concludes that any of the records requested here are publicly available, please let us know.

Thank you for your cooperation. Please do not hesitate to contact us if you have any questions.

Sincerely,

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Submitted on behalf of Sierra Club